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No. 75-1029

In the

Supreme Court of the United States

October Term, 1975

KENNECOTT COPPER CORPORATION,
Petitioner,

v.

RUSSELL E. TRAIN, Administrator of the
Environmental Protection Agency,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE FOR THE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS, INC.

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March 1976

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BRIEF AMICUS CURIAE FOR THE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS, INC.

INTEREST OF AMICUS CURIAE

The Bay Area League of Industrial Associations, Inc. submits this brief in support of Petitioner Kennecott Copper Corporation. Counsel for both petitioner and respondent, Russell E. Train, have consented to the filing of this brief *amicus* by letters which have been presented to the Clerk of the Court pursuant to Rule 42(2).

The Bay Area League of Industrial Associations, Inc. ("BALIA") is an incorporated league of industrial corporations with manufacturing facilities located in the San Francisco Bay area. BALIA is a party to rulemaking in which the Environmental Protection Agency ("EPA") has proposed formally to disapprove certain provisions of the Bay Area implementation plan solely on the grounds that it permitted ground level monitoring controls, based upon the same rationale as EPA's disapproval of the Nevada regulations involved in this case.

REASONS FOR GRANTING THE WRIT

The decision below involves a question of continuing and overriding importance concerning the implementation of the Clean Air Act which should be reviewed by this Court.

This case is one of several cases in which EPA has made it clear that it would disapprove state implementation plans, although the plans provide for the attainment and maintenance of the national ambient air quality standards, if the plans do not rely upon "constant emission controls" and that EPA will not permit other types of emission controls.

The issues presented in this case are also before this Court in connection with previously filed petitions by a group of affected electric utilities (No. 75-774, October Term 1975) to review the decision of the Court of Appeals in *Big Rivers Electric Corporation* v. *EPA*, 523 F.2d 16 (6th Cir. 1975).[1] Because of the importance of these issues to BALIA and its members, on January 16, 1976, BALIA filed a brief *amicus curiae* on behalf of the petitioners Big Rivers Electric Corporation, *et al.*[2]

[1] A petition for a writ of certiorari to review this decision has also been filed by the Tennessee Valley Authority (No. 75-787, October Term 1975).

[2] In response to the two *Big Rivers* petitions filed in February 1976, EPA took the position that the case is moot and that the judgment

(continued)

It is respectfully submitted that the decision below was erroneous on questions of great importance to *amicus curiae* and to other industries affected by state implementation plans. Rather than repeat here arguments which we have made previously, we will instead refer the Court to the brief *amicus curiae* filed by BALIA in the *Big Rivers* case, which appears below in the Appendix.

CONCLUSION

For the reasons set forth herein, and in our brief *amicus* in *Big Rivers*, which appears in the attached Appendix, a writ of *certiorari* should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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[2] (continued)
should be vacated and, in the alternative, that if the Court does not agree that the case is moot the petitions should be denied.

Although we do not wish to respond here to the Government's suggestion of mootness in the *Big Rivers* case, to our knowledge there has been no such suggestion in the present case. Further, EPA has made it clear that the Agency will be taking further actions to disapprove state plans which contain optional control features. *See* Appendix at 5.

APPENDIX

No. 75-774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

BIG RIVERS ELECTRIC CORPORATION
KENTUCKY POWER COMPANY and
KENTUCKY UTILITIES COMPANY,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
RUSSELL E. TRAIN, Administrator,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE FOR THE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS, INC.

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IN THE

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BIG RIVERS ELECTRIC CORPORATION
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BRIEF AMICUS CURIAE FOR THE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS, INC.

INTEREST OF AMICUS CURIAE

The Bay Area League of Industrial Associations, Inc. submits this brief in support of petitioners Big Rivers *et al.* Both petitioners and respondent Environmental Protection Agency have consented to the filing of this brief amicus by letters which have been

presented to the Clerk of the Court pursuant to Rule 42(2).

The Bay Area League of Industrial Associations, Inc. ("BALIA") is an incorporated league of industrial corporations with manufacturing facilities located in the San Francisco Bay area. BALIA is a party to rulemaking in which the EPA has proposed formally to disapprove certain provisions in the Bay Area implementation plan solely on the grounds that it permitted ground level monitoring controls, based upon the same rationale as the agency's disapproval of the Kentucky regulation involved in this case. It is respectfully submitted that the decision below raises important questions concerning the implementation of the Clean Air Act which will have far reaching impact upon amicus curiae, its members, and other industries similarly situated.

REASONS FOR GRANTING THE WRIT

The granting of the petition for a writ of certiorari in this case is supported by several grounds that are traditionally deemed by this Court to warrant plenary review.

I. The Issues Raised by the Decision Below Are of Continuing and Overriding Importance Concerning the Implementation of the Clean Air Act

The petitioners have pointed to the significant economic impact which would be borne by consumers of electric power if the states were required in all cases to enforce only certain types of emission control regulations—"constant emission controls"—and were not permitted to adopted the combination of air pollution regulations best suited to their particular situa-

tion which would meet the national air quality standards. The impact of the decision below, however, would be felt beyond the electric power industry to the extent that it stands as precedent for the disapproval of all ground level monitoring emission controls as *per se* invalid under Section 110(a)(2)(B) of the Clean Air Act, even where such controls are demonstrably effective to reduce or limit air pollution emissions to attain and maintain national air quality standards.

Illustrative of the kind of effective ground level monitoring control which might be held invalid if the decision below were permitted to stand is San Francisco Bay Area BAAPCD Regulation 2, which the EPA has proposed retroactively to disapprove. 40 Fed. Reg. 4445 (January 30, 1975). This regulation permits industrial sources to employ certain types of ground level monitoring controls which limit emissions at all times to meet a 24-hour ground level standard which is more than three times more stringent than the EPA national air quality standard. Where this ground level standard is exceeded by an industrial source, emission control devices are required to limit emissions to meet the standard. In contrast with the intermittent control systems permitted under the Kentucky regulation disapproved in the decision below, emission rates under BAAPCD Regulation 2 are *not* adjusted upward or downward to meet changes in meteorological conditions. Rather, emissions are limited at all times to a level sufficient to meet the stringent BAAPCD standard under the worst predictable meteorological conditions .

The EPA national air quality standards for sulfur dioxide were attained in the San Francisco Bay Area as of May 31, 1972, the date that EPA approved the

California State implementation plan. 40 C.F.R. § 52.238. Computer modeling simulations and actual monitoring data submitted to EPA by amicus curiae demonstrate that the national standards have been maintained since that date and will continue to be maintained in the future by a substantial margin . These data further demonstrate that since May 31, 1972, enforcement of BAAPCD Regulation 2 has effected a substantial reduction in the sulfur dioxide emissions in the San Francisco Bay Area, and has improved air quality beyond that required under the EPA national standards. Further, very substantial additional reductions of emissions are scheduled in 1976. Millions of dollars have been spent since May 31, 1972, by San Francisco Bay Area industry to meet the requirements of BAAPCD Regulation 2.

The proposed retroactive disapproval by EPA of BAAPCD Regulation 2 is based *solely* on the fact that it provides ground level monitoring controls as an option. As stated by the Administrator in his notice of proposed rulemaking:

> "Regulations which contain an emission limitation but which permit compliance with ambient air limitations as an option to compliance with the emission limitation are not approvable." 40 Fed. Reg. at 4446.

If the BAAPCD Regulation 2 ground level monitoring control option is disapproved, the various industry members of BALIA will be required to spend additional millions of dollars for the further abatement of sulfur dioxide emissions although such additional expenditure would not be necessary to maintain the national air quality standards.

This case has an importance beyond that of amicus curiae and its members, significant as that is. In its January 30, 1975, announcement proposing disapproval of BAAPCD Regulation 2, EPA made it clear that the agency would be taking further action to disapprove all state plans which contain optional control features. 40 Fed. Reg. at 4446. The decision below thus involves a question of continuing importance under the Clean Air Act which should be reviewed by this Court.

II. The Decision of the Court of Appeals Below Restricts the Rights of the States, Recognized by This Court in Train v. NRDC, To Adopt a Wide Range of Emission Controls Provided that Such Controls Are Effective To Meet National Standards

The decision below is inconsistent with Congressional policy and misreads this Court's decision in *Train* v. *NRDC*, 421 U.S. 60 (1975), in that it sustains the EPA's disapproval of the Kentucky air pollution regulation without regard to the effectiveness of the control systems permitted under the Kentucky regulation to reduce or limit air contaminant emissions to attain and maintain national air quality standards.[1]

Section 110(a)(2)(B) of the Clean Air Act, 42 U.S.C. § 1857c-5(a)(2)(B), provides that the EPA

[1] "The portion [of the Kentucky regulations] which was disapproved provided as follows:

> "'Where is it demonstrated . . . that an air contaminant source can apply an *alternative control strategy* which *will provide for achievement and maintenance of applicable air quality standards*, the Commission may . . . authorize such control strategy . . . .'" 523 F.2d at 18 (emphasis added).

The Kentucky regulation thus required that an applicable alternative contral strategy must be effective to attain and maintain national standards.

Administrator must determine whether a state implementation plan "includes emission limitations . . . and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard." In *Train* v. *NRDC,* 421 U.S. 60 (1975), this Court affirmed the right of a state to adopt "whatever mix of emission limitations" it deems best suited to its particular situation "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air . . . ." 421 U.S. at 79. This Court's decision in *Train,* therefore, mandates EPA approval of state regulations where they are demonstrably effective for the timely attainment and subsequent maintenance of ambient air standards.

The *Train* decision not only permits maximum flexibility in the kind and mix of control regulations a state may adopt, but, as well, makes it clear that an approvable control strategy may provide that an individual source or group of sources may be completely excepted from the plan. 421 U.S. at 93-94, n. 28. It is within the states's discretion to determine which sources will be restricted as a part of its mix of emission limitations, provided that this mix is sufficient to attain and maintain national standards. As indicated in the *Train* decision, whether or not a specific source or group of sources is controlled by the state's emission limitation mix is not a basis for EPA disapproval of the implementation plan provision.

Further, EPA's emphasis on "constant emission controls" is also directly contrary to this Court's admonition in *Train* against "forcing" the use of technology. The agency's position, as set forth in its proposed disapproval of the Bay Area regulations, is that "constant emission controls" must be applied "wherever technology is available." 40 Reg. 4446. This aspect of EPA's legal position was totally rejected by this Court in *Train*:

> " [S]o long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments." 421 U.S. at 91.

The Clean Air Act as interpreted by this Court in the *Train* decision permits the states to adopt and enforce a wide spectrum of types of emission controls provided that they are demonstrably effective to reduce or limit emissions to maintain and attain national air quality standards.

III. The Court of Appeals Below Has Misread the Decision of This Court in Train v. NRDC and Has Misconstrued the Definition of "Emission Limitation" Under Section 110(a)(2)(B) of the Clean Air Act

The Court of Appeals below misconstrued the opinon of this Court in the *Train* decision to justify the *per se* disapproval of certain classes of emission controls without inquiry into their effectiveness to meet national standards. In *Train* v. *NRDC,* 421 U.S. 60, 78 (1975), this Court referred to the term "emission limitations" broadly as:

> " [R]egulations of the composition of substances emitted into ambient air from [pollution] sources .... They are the specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards."

Although this Court did not elaborate further on this point, since it was not an issue in that case, the court

below seized upon the single term "composition" in the foregoing quote, and redefined an "emission limitation" under Section 110(a)(2)(B) of the Act as

> "[A] rule or regulation pertaining to sulfur dioxide or any other contaminant would quality as an emission limitation only if it regulates the amount of that kind of material which may be included in the emission from a given source." 523 F. 2d at 21-22.

The court then leaped to the conclusion that only a constant emission control device on all sources would satisfy this definition.

The decision below is not supported by this Court's opinion in *Train*, and is contrary to the mandate of Congress. Section 110(a)(2)(B) of the Act refers to "emission limitations and such other measures" and is not confined to constant emission controls. EPA's state plan regulations by their own terms permit great flexibility to the states in the kind and mix of pollution control regulations which they may adopt, collectively termed a "control strategy":

> "'Control strategy' means a combination of measures designed to achieve the aggregate reduction of emissions necessary for attainment and maintenance of a national standard . . . ." 40 C.F.R. § 51(n).

Further, EPA's interpretation of "emission limitations" is inconsistent with Congress' careful use of the term "emission standard" in other provisions of the Act—such as Sections 111 and 112—to refer to constant emission controls. 42 U.S.C. §§ 1857c-6, 1857c-7.

Finally, it is noteworthy that the decision of the Court of Appeals in *NRDC* v. *EPA*, 489 F.2d 390 (5th Cir. 1974), *reversed on other grounds sub nom Train* v. *NRDC*, 421 U.S. 60 (1975), upon which the decision below relies, does *not* go so far as to require "constant emission controls." The distinction between "constant emission controls," *i.e.*, "emission standards," and the broader class of permissible "emission limitations" which may serve to indirectly limit the amount of emissions was clarified by the Fifth Circuit as follows:

> "[I]t is necessary to . . . define different categories of the kinds of 'enforceable controls' which may be employed to affect attainment of ambient air standards. The first, '*emission standards*' refers to standards setting specific *quantitative limits on the amounts* given individual sources may emit into the air. The second, '*emission limitations*' [as defined in Section 110(a)(2)(B) of the Clean Air Act], *is an inclusive term referring to any type of control to reduce the amount of emissions into the air.* This includes, of course, 'emission standards', but also includes a number of regulatory devices. These range from regulations directing sources of emissions to cease or curtail operations to regulations specifying the sulfur content of fuel that fuel-burning emission sources may burn; 'transportation controls' designed to reduce the use of motor vehicles . . . and the imposition of emission charges or other economic incentives aimed at inducing parties to reduce their emissions voluntarily." 489 F.2d at 394, n.2 (emphasis added).

In short, the decision below which mandates constant emission controls is based upon a reading of the Act which is without basis in the statutory language, EPA's own regulations, or judicial decisions.

CONCLUSION

It is respectfully submitted that the decision below was erroneous on questions of great importance to amicus curiae and to other industries affected by state implementation plans. Review by this Court is essential.

Respectfully submitted,

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